No. 96-188

(18)

In The
Supreme Court of the United States

October Term 1996

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

ROBERT K. JOINER, *et al.*,
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF FOR ARDITH CAVALLO AS *AMICUS CURIAE* SUGGESTING AFFIRMANCE

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No. 96-188

GENERAL ELECTRIC CO., *et al.*,
Petitioners,

v.

ROBERT K. JOINER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION OF ARDITH CAVALLO FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* SUGGESTING AFFIRMANCE

Ardith Cavallo, petitioner in Case No. 96-1493, respectfully moves that she be permitted to file a brief *amicus curiae* suggesting affirmance in this case. Mrs. Cavallo has an interest in the outcome of this case.[1] She is petitioner in No.

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[1] A more detailed statement of Mrs. Cavallo's interest is set forth in the Interest of *Amicus Curiae* section of the brief.

96-1493, *Cavallo v. Star Enterprise, et al.*, which presents the same major issue as this case, and which was filed on March 19, 1997, two days after the Court granted *certiorari* in this case. *Cavallo* is pending. If this case is affirmed it would, at a minimum, support a remand of *Cavallo* to the court of appeals for consideration under a different and far less deferential standard of review.

The 19 page brief *amicus curiae* presents a concise argument highlighting major reasons the Eleventh Circuit's decision in this case should be affirmed. We believe the brief will be helpful to the Court.

A letter of consent to the filing of this brief has been obtained from counsel for Petitioners and has been filed with the Clerk. Respondents have withheld consent.[2]

Respectfully submitted,

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[2] As stated in footnote 1 of the brief, no counsel for any party has authored all or any part of the brief. The only persons who have made any financial contribution to the brief or its preparation are Ardith Cavallo and her husband, Lawrence Cavallo.

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GENERAL ELECTRIC CO., *et al.*,
Petitioners,

v.

ROBERT K. JOINER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR ARDITH CAVALLO AS *AMICUS CURIAE* SUGGESTING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*

Ardith Cavallo is petitioner in *Ardith Cavallo v. Star Enterprise, et al.*, No. 96-1493, which was docketed March 20, 1997, and is pending.[1] *Cavallo v. Star Enterprise* seeks

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[1] Petitioners' letter of consent to the filing of this brief has been filed with the Clerk. Respondents have refused consent. No counsel for a party has authored this brief in whole or part, and no person other than Mrs.

review of that part of the judgment of the United States Court of Appeals for the Fourth Circuit[2] which affirmed the district court's exclusion of expert scientific testimony as to the causes of Mrs. Cavallo's illnesses.[3] The exclusion, based on the grant of an *in limine* motion, resulted in a summary judgment for the defendants. The proffered expert testimony in *Cavallo* was that of a well credentialed toxicologist, Dr. David Monroe, and of Mrs. Cavallo's treating physician, Dr. Joseph Bellanti, an internationally prominent physician who heads the Department of Allergy and Immunology at Georgetown Medical Center. He employed the accepted technique of "differential diagnosis" to determine the etiology of Mrs. Cavallo's health problems, which began following exposure to fumes from a release of aviation jet fuel, negligently spilled by the defendants in that case.[4]

The Fourth Circuit applied the most highly deferential abuse of discretion standard of review to affirm district court rulings applying *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in such manner that the court of appeals termed the exclusions "close", and the district court's interpretation "restrictive." The court of appeals found no abuse of discretion in the district court's interpretation of *Daubert* as limiting the admissibility of expert scientific testimony beyond the strictures of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Mrs. Cavallo has an interest in the outcome of the instant case because a decision by the Court in favor of Respondents would, at a minimum, support a remand to the court of appeals to review the district court *Cavallo* rulings under a different and far less deferential standard of review.[5]

SUMMARY OF ARGUMENT

The purpose of this brief is not to present detailed arguments and voluminous citation of authority. Rather, we set forth the reasons we believe most compelling in support of affirmance. The question of the correctness of district court *Daubert* rulings approaches being a question of law which the court of appeals efficiently and effectively can decide on the record.

Cavallo and her husband, Lawrence Cavallo, made any monetary contributions to its preparation or submission.

2 100 F.3d 1150 (1996), *petition for certiorari filed*, 65 U.S.L.W. 3666 (1997).

3 892 F.Supp. 756 (E.D. Va. 1995).

4 *See Cavallo* petition at 2-3.

5 As stated in the *Cavallo* petition at 4-5, n.13 at 12-13; Reply to Br. in Op. at 7-8, *Cavallo* should be reversed regardless of the standard of review because the district court ruled based on a misunderstanding of *Daubert*. In *Cavallo*, we stated the Question Presented as "Whether . . . the Fourth Circuit erroneously applied the most highly deferential abuse of discretion standard of review." We maintain that the standard of review applied should not have been highly deferential abuse of discretion. However, even were that the correct standard, the Fourth Circuit misapplied it.

The standard of review should produce uniformity of results, and predictability in the law. Uniformity discourages institution of cases that cannot pass informed scrutiny and encourages voluntary resolutions of those that can.

Whether a proposed scientific expert followed acceptable methodology cannot be left to the individual discretion of "hundreds of district judges" whose decisions on the issue are subject only to a highly deferential abuse of discretion standard of review. The standard of review should strictly scrutinize exclusion of expert scientific testimony since the Federal Rules of Evidence show a preference for admissibility. The review must be based on whether likely result determinative evidence should have been admitted. However, if the court of appeals makes a preliminary determination that the evidentiary ruling clearly would not have affected the result of the case, it need examine no further.

The lower courts have misconceived the scope and depth of the "gatekeeping" inquiry required by *Daubert*. *Daubert* did not contemplate that district judges would screen and evaluate scientific methodology in excruciating detail. All that was intended is a demonstration that the scientific expert's conclusions are based on application of scientific method and knowledge. Claimed gaps in methodology go to the weight and credibility of the testimony, not its admissibility.

Daubert did not intend mini-trials, even mini-trials on papers. Detailed methodological analysis needlessly and inappropriately consumes judicial resources at both the trial and appellate levels. The role of the trial judge should be only to keep speculation and conjecture from the jury, not to insulate the jury from evidence from reputable scientific sources.

With a limited inquiry, courts of appeals easily can determine whether *Daubert's* requirements have been satisfied. A detailed analysis of methodologies increases the

burden on a reviewing court for those cases appealed. Moreover, a highly deferential abuse of discretion standard of review does not discourage appeals. The detailed inquiry, especially when combined with a highly deferential standard of review, simply increases appellate burdens. Furthermore, a single standard of review favoring admissibility has instructive value for the district courts. Additionally, detailed inquires and rulings by courts have greater and more far reaching impact than a single jury verdict. Judicial mistakes by "amateur scientists" survive and are likely to produce more incorrect results. That is far less likely with an isolated, incorrect jury verdict.

The policy preferring admissibility of evidence does not conflict with the policy of favoring the grant of summary judgment in an appropriate case. The questions of admissibility and whether there is a triable issue of material fact are separate and distinct. The Federal Rules of Evidence do not support excluding evidence so that summary judgment can be granted. Exclusion is the remedy least favored by the Rules.

A highly deferential abuse of discretion standard of review produces nonuniform, inconsistent, and unpredictable results. Cases are difficult to reconcile, and the decisions provide little guidance for the district courts. A review favoring admissibility and looking closely at exclusions produces more uniform and consistent results. Such rulings create not only uniformity, but predictability in the law, and are more useful to the lower courts.

ARGUMENT

TRIAL COURT RULINGS REGARDING ADMISSIBILITY OF EXPERT SCIENTIFIC TESTIMONY SHOULD BE REVIEWED PURSUANT TO A LEGAL STANDARD FAVORING ADMISSIBILITY

A. Introduction

Our purpose is not to repeat at length the arguments and citation to authority that likely will be made by Respondents, and other *amici*. Rather, we present in abbreviated form what we consider the most compelling reasons the question of whether result determinative expert scientific testimony is admitted cannot be left virtually to the complete discretion of individual district judges. The issue of the acceptability of methodology employed by experts whose qualifications are impeccable is, or approaches being, a question of law. Whether characterized as a matter of law, or something akin thereto, the determination of the correctness of the district court decision is something the courts of appeals can decide as effectively on the record as can the trial court.

B. The Standard of Review Should Be Uniform and Neutral, Resulting in Not Merely a "Reasonable", But a Legally Correct Result

While we recognize that absolute uniformity of result on the same, or substantially identical, facts is an ephemeral and illusive goal impossible of achievement, nonetheless, it is a goal the judicial system seeks. That being so, the standards for admissibility of expert scientific testimony must be determined on a circuit-wide basis, and not on the

particular view points of "hundreds of district judges." *Daubert*, *supra*, 509 U.S. at 600 (Rehnquist, C.J., dissenting). There inevitably will be conflicts within the circuits, and among the circuits. However, there are mechanisms for resolution of the intra-circuit conflicts, and, if inter-circuit conflicts become serious enough, this Court may need to resolve them.

Uniformity is not merely an intellectual and abstract end. Its primary purpose is to achieve predictability in the law -- a result that also serves the goal of judicial economy by discouraging institution of cases that cannot pass informed scrutiny, and encouraging voluntary resolutions of those that can.

The circuit that decided *Paoli,*[6] and the Eleventh Circuit in the instant case, recognized correctly that the question of whether a proposed scientific expert followed acceptable methodology to make his/her opinion reliable enough to be admissible cannot be subject to the same highly deferential standard of review as other evidentiary rulings. Thus, while terming the standard of review a deferential one, the deference accorded by those circuits is less than in other evidentiary matters.[7]

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[6] *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), *certorari denied sub nom. General Electric Co. v. Ingram,*__U.S.__, 115 S.Ct. 1253 (1995).

[7] The difference between the "hard look" or a "stringent standard or review" these courts mention and *de novo* review is a matter of degree. The "hard look"/"stringent standard" gives a slight degree of deference to the trial judge, whereas *de novo* review gives none. *Cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 385, 401 (1990), stating that "the abuse of discretion and clearly erroneous standards are indistinguishable." In any event, the discretion exercised by district courts must be with a view that favors admissibility of evidence. *Cf. Ambrossini v. Labarraque*, 101 F.3d 129, 131 (D.C. Cir. 1996), *petition for certiorari dismissed sub nom. Upjohn Co. v. Ambrossini*, 65 U.S.L.W. 3755 (1997) (court must have

The short answer is that a trial judge should not have highly deferential discretion to determine the outcome of a case by ruling upon a matter an appellate court is in as good a position to decide as is the trial judge. While a highly deferential abuse of discretion standard of review necessarily has its place, such review should be confined to those instances where the trial judge is in fact in a far superior position to make a judgment, and where a cold record cannot provide the same vantage point for an appellate court. *See, e.g., Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 385 (1990).

In *Daubert*, the Court held that the *Frye* "general acceptance" test of admissibility of expert scientific testimony was superseded by the Federal Rules of Evidence. The Court noted the liberal thrust of the Federal Rules, which display a preference for admissibility. However, the Court did not address the issue of the standard of appellate review applicable to district court *Daubert* rulings.[8]

As the Third Circuit noted in *Paoli,* and as the Eleventh Circuit stated in this case, the Federal Rules of Evidence evince a preference for admissibility. 35 F.3d at 750; C.P.A. at 4.[9] *Compare, Daubert,* 509 U.S. at 596, stating that "vigorous cross-examination, presentation of contrary evidence, and careful [jury] instruction on the

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strong reasons for declining to let jury decide dispute, especially one of scientific nature).

[8] The Ninth Circuit held in its 1991 *Daubert* decision that the question of reliability under *Frye* should be reviewed *de novo*. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 951 F.2d 1128, 1130 (9th Cir. 1991). On remand from this Court, the Ninth Circuit again proceeded on a *de novo* basis. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1314-1315 (9th Cir. 1995), *certiorari denied*, __U.S.__, 116 S.Ct. 189 (1995). This Court's *Daubert* decision did not direct change in the standard of review applied by the Ninth Circuit.

[9] "C.P.A." references are to the Appendix to the Petition for a Writ of Certiorari.

burden of proof" are to be preferred to "wholesale exclusion under an uncompromising `general acceptance' test", and that "respondent [defendant below] seems to be overly pessimistic about the capabilities of the jury." *And see, Id.*, at 587, 589, noting the FRE's "liberal" standard of relevance, and "the Rules' permissive backdrop." *Cf. Barefoot v. Estelle,* 463 U.S. 880, 900-901 (1983) ("[i]f [the experts] are so obviously wrong . . ., there should be no insuperable problem [discrediting them]", and "the adversary process [can] be trusted to sort out the reliable from the unreliable evidence").

The standard of review must be neutral. That is to say, admission of scientific evidence that results in a judgment against a defendant should be examined under the same standard as applied to exclusion, but with the criterion in mind that exclusion is the least favored remedy. Exclusion of a defense expert should be subject to careful scrutiny. The courts must stand in a neutral posture. There must be guidelines for district judges, and the appellate courts must take a "hard look" at exclusionary evidentiary rulings that likely are result determinative.

As stated above, the courts of appeals are as well equipped to make the determinations as are the district judges. Evidentiary rulings on scientific evidence must not be simply reasonable; they must be legally correct. The Eleventh Circuit in the case at Bar stated just such a standard (C.P.A. at 4):

> we apply a particularly stringent standard of review to the trial court's exclusion of expert testimony.

C. *Daubert* Hearings Should Be Narrow and Based on General Principles

A substantial part of the problem emanates from the lower courts' interpretations of the requirements of *Daubert*. For example, in *Cavallo v. Star Enterprise*, *supra*, the district court believed *Daubert* required it to take a more detailed look at the proposed expert scientific testimony than would have been mandated under *Frye*, stating (892 F.Supp. at 774) (emphasis added):

> Prior to *Daubert*, courts presented with this situation may have been more inclined to admit the expert testimony and allow the jury, aided by vigorous cross-examination, to sort out the relative reliability of opposing expert opinions. But *Daubert* recognized the danger in this approach. * * * *Daubert assigned district courts a more vigorous role to play in ferreting out expert opinion based on the scientific method.*

The Fourth Circuit, while claiming to recognize that *Daubert* was a "liberalization, not a tightening, of the rules controlling the admission of expert testimony" (100 F.3d at 1158), affirmed the district court's detailed analysis of methodology on an issue it called "close", and an approach by the district court that the Fourth Circuit termed "restrictive ..., but ... not inconsistent with *Daubert*" (100 F.3d at 1159).

Daubert did not contemplate that trial judges would scrutinize each and every step of scientific methodology. All that was intended is that it be demonstrated that the expert based his or her conclusion on the application of scientific knowledge and method. That is what the Court meant when

it stated that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional means of attacking shaky but admissible evidence" (509 U.S. at 596). In other words, if there is a gap in, or question about, application of the methodology, such goes to the credibility or weight of the testimony. *It does not go to its admissibility. See Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1518 (10th Cir. 1996); *Jones v. Otis Elevator Co.*, 861 F.2d 665, 663 (11th Cir. 1988). The opponent of the evidence can attack the claimed deficiencies in cross-examination, and can produce contrary evidence, including evidence that the scientific methodology was followed inadequately, and can challenge the underlying "scientific knowledge" on which an expert opinion is based. *See* E.J. Imwinkelried, "Coming to Grips with Scientific Research in *Daubert's* `Brave New World'", 61 Brooklyn L. Rev. 1247, 1253 (1995) ("liberalizing admissibility standards . . . shift[s] the focus to the weight of scientific testimony", and "opponent can proffer studies documenting weaknesses in the underlying technique").[10]

We do not believe the Court intended in *Daubert* to require that mini-trials (even on papers) be conducted in which the trial judge is to examine methodology in excruciating detail, and to have exclusionary rulings subject only to a highly deferential abuse of discretion standard of review. Such exacting analysis of methodologies contemplates tremendous expenditures of both litigants' and judicial resources.[11] Thus, we believe the intent of *Daubert*

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[10] The situation is not unlike challenging eye-witness testimony. For example, a witness who claims to have seen an event might be asked if he wears glasses and whether he was wearing them. Whether he was or not does not go to admissibility. It goes to credibility and weight. In the same way a deviation from exact methodology may make the testimony "shaky", but it does not make it inadmissible.

[11] *Cf. Daubert*, 509 U.S. at 600-601 (Rehnquist, C.J., dissenting):

was to assign to the district judges a gatekeeping role to keep totally unsupported speculation out of the courtroom. However, *Daubert* was not intended to require district judges to do minute screening of basically reputable scientific evidence from reputable sources. *Cf. Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1124-1125 (9th Cir. 1994) (record reflects opinions based on scientific data and techniques "relied on by medical experts in making determinations regarding toxic causation where there is no solid body of epidemiological data", and this "satisfied the requirements established in *Daubert*"). *Daubert's* intent was only to preclude *"[c]onjectures . . . of little use"* (509 U.S. at 597, emphasis added). *See* C.P.A. at 7 (gatekeeping role is simply to guard jury from pure speculation).[12]

> I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or authority to become amateur scientists in order to perform that role.

And see Brief of the Solicitor General at 15 (hereafter, "S.G. Br.") (emphasis added):

> No judge may be presumed to have pre-existing familiarity with whatever principles, techniques, or other technical background material may be relevant to the scientific evidence offered in a particular case. *The district court must expend whatever resources are necessary to achieve sufficient familiarity to discharge its responsibilities under Rule 702.*

[12] That the intent was to preclude only speculation or "conjectures" is further support by the definition of relevance in FRE Rule 401 -- "'Relevant evidence' means any evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Scientific evidence" does not deal with certainties. Thus, an expert opinion usually cannot conclusively establish a fact. The evidence is

Limiting the scope and depth of the *Daubert* inquiry obviates the concerns expressed by Petitioners at pages 38-40 of their brief. Courts of appeals easily can determine whether the basic requirements of *Daubert* have been satisfied. Indeed, the microscopic analysis advocated by Petitioners, regardless of the standard of review, places a heavy burden on a conscientious appellate court. As Petitioners point out (Br. at 44-45), application of a highly deferential abuse of discretion standard of review does not insulate trial court decisions from appellate review. The more detailed the mandated *Daubert* screening, the greater the work required at the trial and appellate levels, and the more judicial resources are consumed. The appellate burden simply is not lessened by a highly deferential abuse of discretion standard of review.

D. A Highly Deferential Abuse of Discretion Standard of Review for *Daubert* Rulings Will Not Lessen Appellate Burdens; It also Is Inconsistent With an Appeal of Right

There is no evidence that a highly deferential abuse of discretion standard will significantly discourage appeals of

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relevant and should be admitted if it *tends* to make the existence of a material fact more or less probable. It is difficult to reconcile the demand for near certainty of scientific evidence in a civil case with the Court's decision in *Barefoot v. Estelle, supra*, which held proper admission for jury consideration psychiatric testimony, correct only one third of the time, to support imposition of the death penalty with a requirement that litigants in a civil case must meet a higher standard. While *Barefoot* was decided on Constitutional grounds, the anomaly remains. Especially is that so since expert testimony generally is only one item, albeit usually a critical item, in a civil party's proof. *See also* pp. 8-9, *supra*.

district court *Daubert* rulings, as evidenced by the numbers of post-*Daubert* and State cases cited in Petitioners' brief -- cases in circuits or jurisdictions reviewing highly deferentially for abuse of discretion. Most of the cases in which detailed hearings are conducted usually are complex and involve potentially large economic consequences. Moreover, as Petitioners point out (Br. at 38-39), the *Daubert* rulings under a detailed screening often are case specific. A highly deferential abuse of discretion standard of review encourages appeals of such case specific rulings much more than simply a required application of general principles, appropriate "liberal" admission of evidence (as contemplated by the Federal Rules of evidence), trial and a jury verdict.

A highly deferential abuse of discretion standard of review with respect to an issue an appellate court is equally well positioned to decide also is inconsistent with the appeal of right from the district court to the court of appeals.[13] Most rulings, including statutory construction, and even Constitutional questions, are, at least to some extent, case specific. Yet, such rulings are not subject only to a narrow abuse of discretion standard of review.

The argument that analysis by the courts of appeals of the application of established criteria to district court *Daubert* rulings does not have instructive precedential value is disingenuous. Indeed, the Solicitor General seems to recognize this (S.G. Br. at 20-21), as well as the problems inherent in the highly deferential standard of review, suggesting that if an appellate court determines an issue of admissibility "for proceedings within its jurisdiction [is] a

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[13] The courts of appeals certainly function to deal with precedent setting matters. However, they also have the obligation to review "routine" cases for error. That is the purpose of the "Unpublished Opinion." If the appeal of right is to be eliminated, the decision to do so is a legislative function.

recurrent issue involving the admissibility of scientific evidence", a different, more searching, and less deferential standard of review is appropriate.[14] It also highlights that judicial pronouncements are much more far reaching and long-lived than a jury verdict in a particular case. Thus, a judicial mistake by a court engaged in "amateur science" survives and is likely to spawn more incorrect results than is an isolated, incorrect jury decision. *See* A. Z. Roisman, "Conflict Resolution in the Courts: The Role of Science", 15 Cardozo L. Rev, 1945, 1949-1950 (1994) (juries' "mistakes die with the particular case", whereas, "[p]ronouncements by federal judges about what is and is not 'good science' . . . carry many others with them", and that "consequences [of judicial mistakes] are far broader").

E. The Policy Favoring Admissibility of Evidence, and the Policies of Rule 56 of the Federal Rules of Civil Procedure Are Separate and Distinct, and Do Not Conflict

FRCP Rule 56 is separate and distinct from the Federal Rules of Evidence. Petitioners' suggestion (Br. at 42-44) that something other than a highly deferential abuse of discretion standard of review for district *Daubert* rulings undermines FRCP Rule 56 is invalid. The argument confuses the question of admissibility of evidence with determining whether there is a triable issue of material fact.

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[14] The Solicitor General does not explain how courts are to know and determine what cases qualify for "special consideration." Furthermore, rather than a universally applicable standard of review, it would create a two-tiered standard, injecting confusion into the review process. Adoption of such an approach would make law in this area almost entirely unpredictable, creating a judicial "free-for-all" and a litigation nightmare. There must be a single standard of review, not a standard of review determined on a case by case basis.

Daubert mentioned the distinction stating that "in the event the trial court concludes that the scintilla of evidence presented supporting a proposition is insufficient to allow a reasonable juror to conclude that the proposition more likely than not is true, the court remains free to direct a judgment, . . . and likewise to grant summary judgment" (509 U.S. at 596). Nothing in the Federal Rules of Evidence supports Petitioners' argument that exclusion of evidence is to be favored if it will result in a summary judgment.[15] On the contrary, as stated above, *Daubert* states that exclusion is the *least favored* remedy.[16]

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[15] Petitioners' concern emanates from the Third Circuit's statement in *Paoli* (35 F.3d at 750) "that when the district court's exclusionary evidentiary rulings with respect to scientific opinion testimony will result in a summary or directed judgment, we will give them a 'hard look' to determine if a district court has abused its discretion in excluding evidence as unreliable." The concern is unwarranted. The just quoted statement is followed by footnote 21 stating that in appropriate circumstances, the district court remains free to grant summary judgment. The *Paoli* court was addressing only the admissibility question. In our view, the standard of review for admission or exclusion of expert scientific testimony should be the same whether an appeal is taken from a judgment based on claimed erroneous admission or exclusion. We believe the Third Circuit's statement was based on a recognition that a substantial number of appeals taken on this issue have been from exclusion of the plaintiff's proffered expert scientific testimony. A single standard of review for *Daubert* rulings better serves both the goals of uniformity and of equity of results. *The standard of review must favor admissibility.* Of course, if the reviewing court determines preliminarily that the evidentiary ruling at issue clearly was not result determinative, its inquiry need proceed no further.

[16] It has been argued that the more stringent and detailed the standards for determining admissibility under Rule 702, the more summary judgments will be granted for defendants where liability is predicated on exposure to an allegedly toxic substance. This is so, it is claimed, because it is the plaintiff who has the burden of proof, and because without expert testimony demonstrating causation, the plaintiff's case will fail. Whether or not this is so, we do not suggest a "'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions"

F. The Highly Deferential Abuse of Discretion Standard of Review Produces Inconsistent, Conflicting, and Unpredictable Results

The highly deferential abuse of discretion standard of review does not produce uniform and predictable results. The cases are difficult, if not impossible, to reconcile. They provide no effective guidance to the district courts.

In *Cavallo v. Star Enterprise, supra*, the district judge excluded a treating physician's testimony based on the established technique of differential diagnosis to determine the cause of Mrs. Cavallo's health problems. The Fourth Circuit affirmed that ruling as a permissible exercise of discretion, not inconsistent with *Daubert*. However, there is no evidence that *Daubert* intended to vest trial courts with this kind of discretion.

While "differential diagnosis" may not be "science in the narrow positivist sense specified in *Daubert*", it is inconceivable that "the Supreme Court could . . . have meant to exclude medical testimony based on differential diagnosis." J.M. Conley and D.W. Peterson, "The Science of Gatekeeping: The Federal Judicial Center's New *Reference Manual on Scientific Evidence*", 74 N.C. L. Rev. 1183, 1203 (1996). *See Paoli, supra*, 35 F.3d at 758-760, upholding the validity of differential diagnosis, and stating that "a doctor does not always have to employ all of these techniques [of differential diagnosis] in order for the doctor's differential diagnosis to be reliable" (*Id.* at 759). *And see* C.P.A. at 10-11. *See also Compton v. Subaru of America, Inc., supra*, 82

(*Daubert*, 509 U.S. at 595-596). However, the potential for skewing results is a matter that deserves more than a passing glance by appellate courts asked to review exclusion of scientific expert testimony where the ruling is result determinative. *See* Roisman, *supra*, 15 Cardozo L. Rev. at 1956-1957, maintaining the argument mentioned above lacks validity.

F.3d at 1517 ("application of *Daubert* factors is unwarranted in cases where expert testimony is based solely on experience or training"). The Fourth Circuit, in *Cavallo*, affirmed exclusion of testimony based on differential diagnosis even though the district court found nothing lacking in the methodology of the differential diagnosis performed by Dr. Bellanti, the treating physician. *See* 100 F.3d at 1158-1159, 892 F.Supp. at 770-773.

Unlike the Eleventh Circuit in the case at Bar, the Fourth Circuit affirmed as a permissible exercise of discretion the district court's rejection of toxicological testimony as to the effects of the jet fuel vapors on Mrs. Cavallo. The district court refused to accept extrapolations from different levels of exposure to volatile organic compounds in the studies on which he relied. It also held his reliance on those studies improper because they did not specifically involve aviation jet fuel, but only a number of the compounds contained in jet fuel. Additionally, it dismissed his conclusions regarding the sensitizing effects of exposure to the chemicals because some of the studies cited were "controversial" and, more importantly, *did not specifically establish a link between the illnesses and aviation jet fuel*. *See* 892 F.Supp. at 768-769. Thus, the district court required studies showing effects of exposure to precisely the same product, not simply the compounds in that product.

The Fourth and other circuits, both before and after *Daubert* consistently have held that an epidemiological study need not involve precisely the exposures claimed to justify scientific opinions based on extrapolation. The *Cavallo* decision conflicts, for example, with the Fourth Circuit's decisions in *Benedi v. McNeil - P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995) ("we do not read *Daubert* as restricting expert testimony to opinions that are based solely on epidemiological data"); and *City of Greenville v. W.R. Grace Co.*, 827 F.2d 975, 980 n.2 (4th Cir. 1987) (extrapolation

from effects of high levels of exposure to low levels permissible, and liability need not wait until people actually get sick from low level exposure). It also is a odds with *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1535 (D.C. Cir. 1984) ("a cause and effect relationship need not be clearly established by epidemiological studies before a doctor can testify that, in his opinion, such a relationship exists"); and *Wells v. Ortho Pharmaceutical Corp.*, 788 F.2d 741 745 (11th Cir. 1986), ("Plaintiffs' burden . . . did not necessarily require them to produce scientific studies showing a statistically significant association . . . [of] malformations in a large population").

The above demonstrates that the highly deferential abuse of discretion standard of review is unworkable for review of *Daubert* rulings. Litigants cannot predict likely outcomes. Results are inconsistent and confusing.

CONCLUSION

The decision of the Eleventh Circuit should be affirmed. As part of that affirmance, this Court should clarify the scope and depth of the *Daubert* inquiry, making plain, as we believe *Daubert* intended, that the only purpose of judicial "gatekeeping" under FRE Rule 702 is to keep speculation and conjecture out of the courtroom.

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